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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL ANGEL ABALOS,

Defendant and Appellant.

C035612

(Super. Ct. No. 99F07448)

A jury convicted defendant of committing forcible lewd or lascivious acts on a child under 14 years of age (Pen. Code, § 288, subd. (b)(1)), and aggravated sexual assault on a child under 14 years of age and 10 or more years younger than defendant by way of forcible penetration with a foreign object. (Pen. Code, § 269, subd. (a)(5).) The trial court sentenced defendant to imprisonment for 15 years to life.

Defendant's sole contention is that the judgment must be reversed because, in his view, the trial court erred by

instructing the jurors, pursuant to CALJIC No. 17.41.1, they were obliged to advise the court if any juror refused to deliberate or expressed an intention to disregard the law or to decide the case based upon penalty or punishment or any other improper basis. We disagree and will affirm the judgment.

#### DISCUSSION

The trial court instructed the jury with CALJIC No. 17.41.1 as follows: "The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or decide the case based on any improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation in your deliberations."

Defendant argues CALJIC No. 17.41.1 improperly compromises the privacy of jury deliberations, is an improper anti-nullification instruction, chills free discussions among jurors, and denies a defendant the right to a unanimous verdict. He further contends the error is "structural" and thus requires reversal per se. We disagree.

##### *A. It Is Not Error to Give CALJIC No. 17.41.1*

We conclude the court properly instructed with CALJIC No. 17.41.1. As we shall explain, the instruction serves the important function of protecting the due process right of litigants to a fair trial and promoting the rule of law, which is the cornerstone of our legal system.

Among the elements of the right to trial by jury guaranteed by article I, section 16 of the California Constitution is the requirement that, after the case is finally submitted to them, the jurors must engage in deliberation before reaching a verdict. (*People v. Collins* (1976) 17 Cal.3d 687, 693.) This does not mean the jurors are precluded from taking a vote before discussing the case. (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 910-912.) Such a vote is a form of jury deliberation in that it constitutes the expression of jurors' opinions about the case, "albeit without accompanying reasons or explanations." (*Id.* at p. 912.)

To deliberate means "to ponder or think about with measured careful consideration and often [but not necessarily] with formal discussion before reaching a decision or conclusion." (Webster's 3d New Internat. Dict. (1986) p. 596.) Thus, if the jurors are able to decide the case on the first vote, they effectively have determined that further deliberation is unnecessary. (*Vomaska v. City of San Diego, supra*, 55 Cal.App.4th at pp. 910-911; Pen. Code, § 1128 ["After hearing the charge, the jury may either decide in court or may retire for deliberation. If they do not agree without retiring for deliberation, an officer must be sworn to keep them together for deliberation . . . ."]; Code Civ. Proc., § 613 ["When the case is finally submitted to the jury, they may decide in court or retire for deliberation . . . ."].)

When, however, the jurors are unable to decide the case without discussing the issues, it is the duty of each juror to

deliberate further. (Pen. Code, § 1128; *People v. Collins*, *supra*, 17 Cal.3d at p. 693; *Vomaska v. City of San Diego*, *supra*, at pp. 911-912; see also Code Civ. Proc., § 612 ["Upon retiring for deliberations the jury may . . . ."], § 612.5 [similar language], § 614 [same]; Pen. Code, § 1093, subd. (f) [same], § 1137 [same], § 1138 [same].) "Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint." (*People v. Collins*, *supra*, at p. 693.)

Because jury deliberation is an element of the right to trial by jury, a juror's refusal to deliberate is misconduct amounting to the inability and failure to perform the juror's duty, for which he or she can be discharged. (Pen. Code, § 1089; Code Civ. Proc., § 233; *People v. Thomas* (1994) 26 Cal.App.4th 1328, 1333.) So, too, is a juror's expression of intent to disregard the law. (*People v. Collins*, *supra*, 17 Cal.3d at p. 696.) Likewise, the expression of an intent to decide the case based upon the penalty that could be imposed by the court is misconduct which constitutes a failure to perform the juror's duty and justifies his or her removal for cause. (*People v. Shannon* (1956) 147 Cal.App.2d 300, 306; cf. *People v. Daniels* (1991) 52 Cal.3d 815, 864 ["a juror's serious and wilful misconduct is good cause to believe that the juror will not be able to perform his or her duty"].)

Such is the case with other forms of juror misconduct. (E.g., *People v. Daniels*, *supra*, 52 Cal.3d at pp. 863-664 [juror

"discussed the case with outsiders"]; *People v. Holloway* (1990) 50 Cal.3d 1098, 1108, 1110-1112 [juror read newspaper accounts which "revealed information about defendant's prior criminal conduct that the court had ruled inadmissible because of its potential for prejudice"], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

The evil of such juror misconduct is that it deprives a party of the cornerstone of our jury system, a decision made by neutral factfinders based solely upon the applicable law and the evidence admitted at trial. (*United States v. Gorham* (D.C. Cir. 1975) 523 F.2d 1088, 1098 ["Of course a jury can render a verdict at odds with the evidence and the law in a given case, but it undermines the very basis of our legal system when it does so."].)

Not only is juror misconduct unfair to a party in the case, it has great potential to undermine public confidence in our entire system of justice. "The right to equal justice under law inures to the public as well as to individual parties to specific litigation, and that right is debased when juries at their caprice ignore the dictates of established precedent and procedure." (*United States v. Gorham, supra*, 523 F.2d at p. 1098.)

In an effort to prevent these evils, jurors properly are admonished among other things that: (1) they have a responsibility to deliberate as impartial judges of the facts (CALJIC Nos. 17.40, 17.41); (2) they must accept and follow the law as stated to them by the court, regardless of whether the jurors agree with the law (CALJIC Nos. 0.50, 1.00); (3) they must decide the case solely upon the evidence presented to them (CALJIC Nos. 0.50, 1.03) and,

thus, may not independently investigate the facts or the law, or consider or discuss facts as to which there was no evidence (CALJIC Nos. 0.50, 1.03); (4) they must not discuss or consider the subject of penalty or punishment (CALJIC No. 17.42); (5) they must not be influenced by pity for, or prejudice against, the defendant or by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling (CALJIC Nos. 0.50, 1.00); (6) they are not partisans or advocates in the case but, instead, must be impartial judges of the facts (CALJIC No. 17.41); (7) both the defendant and the People have the right to expect that the jurors will conscientiously consider and weigh the evidence, apply the law, and reach a just result regardless of the consequences (CALJIC Nos. 0.50, 1.00); (8) the jurors must promptly report to the court any incident within their knowledge involving an attempt by any person to improperly influence any member of the jury (CALJIC No. 0.50); and (9) they may address questions or requests to the court (CALJIC No. 17.43).

CALJIC No. 17.41.1 essentially is a summary of those instructions, restated in a way that makes it clear each juror has an obligation to inform the court if any other juror refuses to deliberate, expresses an intention to disregard the law, or expresses an intention to decide the case based on penalty or any other improper basis.

CALJIC No. 17.41.1 does not address either the investigative process after the trial court is advised of the possibility of juror misconduct, or what must be shown in order for the trial

court to discharge a juror for misconduct.<sup>1</sup> As we have just noted, the instruction simply reiterates some of the jurors' duties and informs jurors that they should advise the court if they believe a fellow juror is engaging in misconduct -- no more, no less. Such an instruction, in and of itself, does not intrude upon the secrecy of the deliberative process.

Nevertheless, defendant asserts that the instruction has a chilling effect on deliberations by making it less likely a juror will hold fast to a decision disfavored by other jurors for fear that he or she will be reported to the judge. This argument ignores the tenacity of hold-out jurors demonstrated daily in California's trial courts when jurors disagree about the state of the evidence and adhere to the court's admonition that a juror should not "change an opinion" and "decide any question in a particular way [simply] because a majority of the jurors, or any of them, favor that decision." (CALJIC No. 17.40.)

Simply stated, we are unconvinced that CALJIC No. 17.41.1 operates in any way to coerce a juror to abandon his or her view of the evidence for fear of retaliation by a court which explicitly has instructed the jurors that (1) if the court had done or said anything seeming to indicate what the jury should find to be the facts, "you [the jurors] will disregard it and form your own conclusion" (CALJIC No. 17.30), (2) both the defendant and the

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<sup>1</sup> Thus, for example, in evaluating defendant's challenge to CALJIC No. 17.41.1, we need not decide what must be shown to establish that a juror actually has refused to deliberate.

People "are entitled to the individual opinion of each juror" (CALJIC No. 17.40), and (3) each juror must not decide any question in a certain way simply because a majority of the jurors favor that decision (CALJIC No. 17.40).

Defendant claims that CALJIC No. 17.41.1 discourages jurors from exercising the power of jury nullification. Our response is, "precisely and for good reason."

"Our legal system, indeed the social compact of a civilized society, is predicated upon respect for, and adherence to, the rule of law." (*People v. Chong* (1999) 76 Cal.App.4th 232, 243.)

Jury nullification threatens the rule of law and "runs the risk of degrading the legal structure requisite for true freedom, for an ordered liberty that protects against anarchy as well as tyranny." (*United States v. Dougherty* (D.C. Cir. 1972) 473 F.2d 1113, 1137.) "To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic, as [the proponents of jury nullification] claim, but inevitably anarchic." (*Id.* at pp. 1133-1134.) That is precisely why trial courts do not inform jurors of their power of jury nullification. (See *People v. Dillon* (1983) 34 Cal.3d 441, 487-488, fn. 39.)

Of course, there are those who point to examples from the formative years of our nation and claim jury nullification is a



"fundamental necessity of a democratic system" to serve as check against abuses of the executive power. (*United States v. Moylan* (4th Cir. 1969) 417 F.2d 1002, 1005-1006; see *United States v. Dougherty, supra*, 473 F.2d at pp. 1130-1133; Pound, *Law in Books and Law in Action* (1910) 44 Amer. L.Rev. 12, 18.) This myopic claim overlooks gross abuses of the power of jury nullification that occurred within the last century when, despite strong evidence of guilt, juries in southern states acquitted persons accused of committing crimes against Black victims. (Marder, *The Myth of the Nullifying Jury* (1999) 93 Nw.U. L.Rev. 877, 888-889.)

Hence, "despite one proponent's assertion that jury nullification 'arising from idealism is good for the American soul,' there is no guarantee that jurors who decide to nullify the law in fact will be acting out of idealism, rather than cynicism or maliciousness. For once jurors reject the guidance offered by law, they are free to use their power to reach a general verdict in any manner they choose. As a result, 'defendants equally guilty of the same offense stand to receive widely disparate treatment for their acts.' This is one of the worst aspects of jury nullification, namely, 'its further removing the administration of criminal justice from an ideal toward which it should be aspiring': equal justice under law." (Note, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy* (1996) 85 Geo. L.J. 191, 219-220, fns. & citations omitted.)

"[R]ather than being an expression of democracy, jury nullification is fundamentally antidemocratic." (Note, *supra*, 85 Geo. L.J. at p. 213.) Our state and nation have developed detailed

systems of law governing the conduct of businesses and individuals in our society, with substantial procedural protections and effective means to change the law within the framework of the democratic process. When, in a criminal case for example, "a jury refuses to find a defendant guilty of violating a particular law, even though the facts presented at trial clearly indicate his guilt, it is saying, in effect, that it rejects the legislative policy choice embodied in the law. [But] [s]uch a policy choice is the product of a multitude of considerations, including concerns about the law's moral implications, its political feasibility, and the social and economic consequences it is expected to have." (*Id.* at pp. 214-215.) Jury deliberation in a particular case is not an appropriate forum to reevaluate those policy judgments. (*Id.* at pp. 214-215.) "To the extent that nullifying juries attempt to respond to social conditions, they perform other branches' functions, and these functions are not ones that the jury is particularly well suited to perform." (Marder, *supra*, 93 Nw.U. L.Rev. at p. 907; Note, *supra*, 85 Geo. L.J. at pp. 214-215.)

"Thus, far from promoting democracy, the doctrine of jury nullification undermines its most fundamental principles." (Note, *supra*, 85 Geo. L.J. at p. 217.) "The end result of [the jury nullification] process must be a catastrophic weakening of 'the most important value of Western democracy': the rule of law." (*Id.* at pp. 216-217, fn. and citation omitted.)

Not only does jury nullification threaten the rule of law, it is, as noted above, unfair to a party in the case. Due process, both procedural and substantive, means that a party is entitled to

a fair hearing and result in accordance with the law. (*Stein v. New York* (1953) 346 U.S. 156, 197 [97 L.Ed. 1522, 1549], overruled on other grounds in *Jackson v. Denno* (1964) 378 U.S. 368, 391 [12 L.Ed.2d 908, 924].) Jury nullification deprives a litigant of its right to a fair hearing and therefore denies the litigant due process of law.

Consequently, although jurors have the raw power to engage in jury nullification, it is an illegitimate power that courts may not condone. By directing jurors to inform the trial court if any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty, punishment, or any other improper basis, CALJIC No. 17.41.1 serves the important function of protecting the due process rights of litigants and promoting the rule of law.

For all the reasons stated above, we reject defendant's attack on CALJIC No. 17.41.1 and affirm the judgment.

B. *Any Error In Giving CALJIC No. 17.41.1 Was Harmless*

Even if we were to assume, solely for the sake of argument, that giving CALJIC No. 17.41.1 were federal constitutional error, the error would not be reversible per se. In *People v. Molina* (2000) 82 Cal.App.4th 1329 (review den. Nov. 29, 2000, S091788) this court held that any error in giving CALJIC No. 17.41.1 is not reversible per se, but is subject to harmless error analysis under the standard of *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705]. (*People v. Molina, supra*, pp. 1335-1336.) We note defendant's disagreement with *Molina*.

In this case, as in *Molina*, the jury did not communicate with the court at all during its deliberations (*Molina, supra*, 82 Cal.App.4th at p. 1336), except to ask for a copy of the police report taken on the day of the incident (a request which was denied because the report was not in evidence). Further, the jury found defendant not guilty of a kidnapping. (Pen. Code, § 207, subd. (b), count one).

There is nothing in this record indicating defendant was prejudiced by the giving of CALJIC No. 17.41.1, and he does not attempt to cite any such matters. Under similar circumstances in *Molina*, we stated: "We will not infer that the jury instruction had any impact prejudicing defendant. We reject defendant's speculative assumption that the instruction had a chilling effect on the jurors' deliberations, inhibiting the kind of free expression and interaction among jurors that is so important to the deliberative process. There is no warrant for that view on this record." (*People v. Molina, supra*, 82 Cal.App.4th at p. 1336.) Hence, we also affirm on the alternative basis that any error in giving the instruction was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

\_\_\_\_\_, J.  
MORRISON

We concur:

\_\_\_\_\_, P.J.  
SCOTLAND

\_\_\_\_\_, J.  
NICHOLSON